VIRGINIA LAW REGISTER

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The following act we are informed has passed both houses of the Legislature and received the signature of the Governor:

The New Remedy by Motion for Torts.

"Be it enacted by the General Assembly of Virginia, That any person *having a right of action at law for any tort,* may, on motion before any court which would have jurisdiction in an action otherwise than under section thirty-two hundred and fifteen, obtain judgment for such tort, after thirty days' notice, which notice shall be returned to the clerk's office of such court, within five days after the service of the same, and after such thirty days' notice, the motion shall be docketed. A motion under this section which is docketed under section thirty-three hundred and seventy-eight shall not be discontinued by reason of no order of continuance being entered upon it from one day to another, or from term to term. And upon such motion the same rules shall apply with reference to bills of particulars and grounds of defense as are now provided by law in other actions or motions."

We wonder if our legislators have thoroughly considered the effect of exempting from the provisions of this act actions brought under § 3215 of the Virginia Code. Section 3215 reads as follows:

"An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein."

Now most of the actions brought for torts are against corporations. Will not any person desiring to proceed against a corporation by motion for a tort, be compelled to proceed in the place where the corporation has its chief office? For a corporation has no other *residence* than its chief office unless otherwise provided for by statute; and § 3214 of our Code provides in express terms that "if a corporation be a defendant" suits "ex-

cept where it is otherwise especially provided may"—which in fact means *must*—"be brought in any county or corporation wherein its principal office is or wherein its mayor, rector, president, or other chief officer resides."

So it seems to us that very few suitors will care to take advantage of this act. A person against whom a tort is committed in Alleghany County, by a corporation whose principal office is in Richmond, or whose president or other chief officer resides in Alexandria, would, we imagine, much prefer the old common-law action of trespass, which he could bring in that county, to a notice and motion under the new act, which would compel him to go with his witnesses a hundred miles away.

This new act seems indeed to "keep the word of promise to the ear, and break it to the hope."

Nor can we see any good reason for this exception. It is true that it occurs in the statute allowing notices and motions for judgment on contracts for money, but we could never see any good reason for the exception even in that case. We do not believe that any more restrictions should be put upon an action at law by motion—for such it is defined to be in Reed *v.* Gold, 101 Va. 37, than upon an action under the common law, and § 3215 should apply as much to one as to the other. It is not too late to correct this omission and we sincerely hope it will be done at this session of the Legislature.

Libel of Candidates for Office in Virginia.

The case of Williams Printing Company *v.* Saunders, decided by our Supreme Court on January 18th, is of much interest in more respects than one. First: It sets a judicious, reasonable and proper limit to the criticism of public officers or candidates for office, and sharply and clearly draws the distinction between imputations of moral delinquency with reference to private character, and charges which affect fitness for office.

Second: It plainly indicates the limit to which newspaper criticism can go and asseverates the fact—which some of the newspaper gentry have been disposed to question—that a news-

paper enjoys no special privilege or immunity but stands before the law upon the same footing as the great body of citizens. "Liberty of the press is not license," the Court quotes with approval; and with great force the learned President of the Court states a proposition which is novel, we believe, but deserves to be written where all can read it: i. e., that by "liberty of the press" the fathers meant that publication should not be subject to *"antecedent censorship."* We do not know of any other decision in which this definition is so clearly given and we hail it as the soundest enunciation of the true meaning of that much abused term.

Third: It clearly defines privileged communications and malice in regard to libel.

And lastly, it recalls to attention the well-nigh forgotten case of Commonwealth *v.* Morris, 3 Va. 176, and alludes to the remarkable fact that this is the only reported case of criminal libel in the history of the Commonwealth.

This case was referred to as establishing the fact that whilst in England truth could not be set up as justification in prosecution for a criminal libel, yet the opposite was the case in Virginia; the jury assessing the fine in this State, the truth of the alleged libel might be given in evidence in mitigation of the fine. In the case at bar the defendants failed to file a plea of justification, but attempted to introduce evidence of the truth of the charges under the general plea of not guilty, and cited Commonwealth *v.* Morris as supporting their contention. The Court, after setting out ample authority to show that this criminal case had never been considered authority in any of the reported civil suits in this State, ended the matter by citing our statute on the subject—§ 3375—which clearly indicates that if the Legislature had intended that proof of the truth of a libel could be given under the plea of not guilty, that body would have had no occasion to require that it should be alleged.

The case is an interesting and valuable contribution to the law of libel in this State and the opinion is one of the clearest and ablest on the subject we have ever read.

Unintentional Libel.

And this case reminds us that the English law of libel is in about as mixed a condition as any law possibly could be if we are to judge by the various decisions on the question of identification in libel cases. Our readers may remember that we commented some time ago upon a case in which an unfortunate author was mulcted in heavy damages because the name which he had given to the heavy villain in his book proved to be the same as that of an obscure individual in a distant city of whose very existence it was proved the author had never heard.

And yet as far back as 1869 in the case of Harrison *v.* Smith Mr. Justice Lush had decided that no person could say that a character in a novel bearing his name applied to him if the character was a creature of the imagination; but in 1910, in the case of Jones *v.* Hulton, A. C., page 24, Lord Loreburn held just the opposite, stating that if an author delineated a character he must be circumspect in the name he selects, for if any person whom the name and character fit can be found, that person is entitled to damages, though the author had never heard of him.

But in the case of Flanders *v.* Forester, decided the last week in January of the present year and tried before the Lord Chief Justice and a special jury, Lord Loreburn seems to have been reversed to this extent: *The Pall Mall Gazette* had published a story called "A Sad Affair" in which a young man named George Flanders and two young ladies had a meeting in a park. There was a George Charles Flanders, a motor engineer, who imagined himself slandered by the story, so he sued the printer and publisher. He produced three of his friends in his native town who all avouched their belief that the George Flanders in the story was intended for George Charles Flanders; but the special jury were not satisfied that any sensible and reasonable person reading the story could come to the same conclusion, so they sensibly found a verdict for the defendant.

It looks very much, therefore, in England as if authors had to depend upon juries' good, sound common sense, instead of upon the law.

The question of "Incertainty" as to the object of libel and

slander covers no less than 14 pages in Rolles' Abridgement, and there are 80 cases devoted to this subject.

Balzac, the great French novelist, who used to select odd names which he saw upon signs for his characters, would have been in a very bad way if he had lived in England.

Newspapers and the Courts.

"Trial by newspaper" will become a thing of the past if the courts of this country will only sustain Judge Keith's terse and brilliant definition of the "Liberty of the Press," and follow the lead of the Supreme Court of Victoria in In re *Packer ex parte Peacock*. Dr. Peacock was under examination before a magistrate on the charge of murder. A Victorian newspaper published a series of articles in which the guilt of the accused man was suggested in a most unmistakable way. The Supreme Court took cognizance of the articles, although the case had not reached that tribunal, held the publisher in contempt and fined him a thousand dollars. The editor contended that the court had no jurisdiction to punish him, as the contempt—if contempt it was—could not be of that court. But the Chief Justice held that the Court of King's Bench has always had most ample and undefined and unlimited Jurisdiction in controlling the operations of all inferior jurisdictions. The common law having a remedy for every wrong, the Court had a right to prevent the minds of prospective jurymen from being poisoned by suggestions—to have the guilt or innocence of accused persons ascertained by legal evidence and to protect individuals whose lives are in peril from newspaper interference with fair trial.

The Court might have quoted several cases from the High Court of the Mother Country, which has time and again asserted its power to punish the publishers of sensational newspaper articles concerning persons charged with murder but not committed for trial. Rex *v.* Davies, 1 K. B. 32; Rex *v.* Clark; Ex-parte Crippen, 103 L. T. 636.

In no country of the world is the license of the press so outrageously used as in this country of ours. Let a murder occur—

especially if there is a sensation connected with it—and straightway every "five dollar a column" penny-a-liner becomes a sleuth and devotes himself and the columns of the journal for which he writes to the exploitation of "clues," suggestions, charges, innuendoes, direct accusations and a man is found guilty and condemned to death by the newspapers before he is indicted by a grand jury. We need a few courts like the one in Victoria and the English High Court.

Libel upon Public Officials.

The Supreme Court of the United States has also had before it a suit in which the question of libel upon a public officer was concerned, in the case of Gandia *v.* Pettingill, decided Jan. 9th, 1912. Opinions U. S. S. C., Oct. Term, 1911, p. 127. It seems that in Porto Rico—in which Territory Pettingill was United States Attorney—the local law prohibits an officer of the local government from engaging in private practice. A Porto Rican newspaper charged Pettingill with indulging in private practice and acting as lawyer on behalf of persons bringing suits against the Porto Rican government. It characterized such conduct as "a monstrous immorality, scandal," etc. Pettingill sued and recovered damages. The Supreme Court reverses the case on the ground that anything bearing upon the acts of a public officer connected with his office is a legitimate subject of comment, at least in the absence of express malice, which is of course good law. But the Court also reverses the case upon the ground that it was in evidence that the people of Porto Rico considered the acts charged as immoral since the officer, had he been a local one, would have been forbidden by the local law to do the acts complained of. But we do not understand how the Court gets around the fact that what Pettingill did was absolutely correct and in violation of no law whatever, and yet was characterized as a "monstrous immorality." He was not a local officer. He had a perfect right to take any practice he saw fit, not conflicting with his duties as United States Attorney, and therefore the statements and comments were not legitimate, in our humble judgment, even though

they may be considered in the language of the Court "exuberant expressions of meridional speech" (Justice Holmes, as might be inferred from this language, delivering the opinion).

The thing that shocks us most in the opinion, however, and we confess to a distinct shock, is the statement that since the people of Porto Rico considered the acts charged as immoral and the statute referred to showed that such was their conception of public duty, the plaintiff could not recover. Is not this allowing the law of libel to be fixed by the "General muster?"

Inspection Laws.

We suggest to our law makers that they might pause in their wild career in their efforts to prevent treating in public barrooms, drinking on trains, *even* with the conductor's leave, and wasting valuable time over the "howling crowd" of ministers —so called "temperance agitators"—and others as to submitting prohibition to a referendum, and take a leaf out of North Carolina's book and pass a law requiring the inspection of kerosene and illuminating oil. The Supreme Court of the United States has on January 9th, 1912, upheld the statute of North Carolina which subjects all such oils to a rigid test and requires the payment of a charge of one-half a cent a gallon to defray the expenses of such a test. Of course the oil men fought the law—First, for the reason that the tax was more than required for the purpose; second, that it was in violation of the Commerce Clause of the United States Constitution; third, that it delegated Legislative powers to the Board of Agriculture.

As to number one, the Supreme Court said it had no data before it to determine whether the charge was excessive or not.

As to number two, it held that it was a proper exercise of the police power and not a violation of the Commerce Clause.

As to number three they simply cited four cases, commencing with Buttfield *v.* Stranahan, 192 U. S. 492, and waived it aside as settled.

The oil men raised innumerable objections to the rules and regulations adopted by the Board of Agriculture, but the Supreme Court said it had nothing to do with these, and then it

adds these words which we wish every agitator and advocate of the courts making or construing laws to suit popular clamor could read: "A law cannot be declared invalid because in the opinion of the Court it does not accord with sound policy. The appeal for redress in such case must be to the law-making power."

Judgment by Notice and Motion.

Since our editorial on "Judgment for Torts on Notice and Motion" we have received a copy of the bill published below, and we deem it of so much importance to the profession that we insert it *in extenso* in our editorial columns. We understand that this bill has been favorably reported by the committee and we earnestly hope that it will become law. It does not abolish common-law pleading, leaving the election of remedies under that system to the pleader, but it is a long step in the right direction.

An ACT to amend and re-enact section 3211 of the Code of Virginia as amended by chapter 110, page 140, of the Acts of Assembly 1895-1896, entitled an act to amend and re-enact section 3211 of the Code of Virginia in relation to the remedy by motion for the judgment after fifteen days' notice on contracts generally.

1. Be it enacted by the general assembly of Virginia, That section thirty-two hundred and eleven of the Code of Virginia, as amended by chapter one hundred and ten, page one hundred and forty, of the acts of assembly of eighteen hundred and ninety-five-six, entitled an act to amend and re-enact section 3211 of the Code of Virginia in relation to the remedy by motion for judgment after fifteen days' notice on contracts generally, be amended and re-enacted so as to read as follows:

Sec. 3211. Remedy by Motion Generally—Proceedings Therein.

1. Any person entitled to recover by action at law any specific personal property, or any debt, or damages for breach of a contract, express or implied, or damages for a wrong, may, on motion before any court which would have jurisdiction in an action, obtain judgment for such specific personal prop-

erty, debt, or damages after fifteen days' notice, which notice, together with a number of copies thereof equal to the number of defendants named therein, shall be filed in the clerk's office of such court, and, upon payment of the writ tax thereon shall be docketed. Such proceeding by notice and motion shall be deemed to be an action at law, and such action shall be deemed to be instituted at the time of the filing of such notice in the clerk's office.

2. The clerk shall forthwith deliver copies of such notice to the proper officer for service upon the defendants, and service thereof shall be made as provided in sections three thousand two hundred and seven and three thousand two hundred and eight.
3. The notice shall contain the names of the parties, plaintiff and defendant, the names of the court and county or corporation in which the proceedings is instituted, the terms and the date when such motion is to be made, a plain and concise statement of the substantive facts constituting the cause of action, without unnecessary repetition, and the nature of the relief demanded. Causes of action arising ex contractu may be united in one notice and causes of action arising ex delicto may be united in one notice, but causes of action ex contractu and causes of action ex delicto may not be united in the same notice, and each cause of action must be stated separately, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished.
4. The pleading on the part of the defendant shall be either a demurrer or answer. The defendant may demur to the notice when it appears upon the face thereof that the court has no jurisdiction of the person of the defendant or of the subject of action, or that the plaintiff has no legal capacity to sue, or that there is another action or suit pending between the same parties, for the same cause, in this state, or that there is a defect of parties, plaintiff or defendant, or that several causes of action are improperly united in the notice, or that the notice does not state facts sufficient to constitute a cause of action. The demurrer shall distinctly specify the grounds of objection to the notice. The defendant may demur to the whole notice, or to any one or more of the alleged causes of action stated therein, and answer the residue.
5. The answer of the defendant shall contain: first, a general or specific denial of each material allegation of the notice controverted by the defendant, or any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defence, set-off,

or counter-claim in ordinary and concise language, without unnecessary repetition. Different consistent defences may be stated separately in the answer.

6. The plaintiff may demur to one or more defences set up in the answer, stating distinctly the grounds thereof; and where the answer contains new matter, the plaintiff shall reply to such new matter, denying generally or specifically the allegations controverted by him, or any knowledge or information thereof sufficient to form a belief, and he may allege in ordinary and concise language, without unnecessary repetition, any new matter, not inconsistent with the notice, constituting a defence to the new matter in the answer. When such reply is filed, the action shall be deemed at issue, except that, by leave of court, the defendant may demur to new matter in such reply.
7. If the answer contain a statement of new matter sufficient to constitute a defence, and the plaintiff fail to demur or reply thereto within the time prescribed by the court, by general or special order, the defendant shall have such judgment as he is entitled to upon such statement, and, if the case require it, a writ of inquiry of damages may issue.
8. The reply shall be governed by the rules herein prescribed in relation to answers, and demurrers to the answer or reply shall be governed by the rules so prescribed in relation to demurrers to notice, where such rules apply.
9. After a demurrer the plaintiff or defendant, as the case may be, may amend of course, and with or without costs, as the court may order, or the demurrant may withdraw his demurrer, and answer or reply, as the case may be.
10. Any other defects, imperfections, omissions, or mistakes in the notice, answer, or reply than such as are hereinbefore mentioned in subsection four of this section may be corrected, inserted, or stricken out on motion of either party.
11. The demurrer or answer of the defendant to the notice shall be filed in court, or in the clerk's office thereof, on or before the day named in the notice for the making of the motion, unless longer time be granted by the court. The demurrer or reply of the plaintiff to the answer, the demurrer of the defendant to the reply, and the amended notice, answer, or reply shall be filed in court, or in the clerk's office thereof, within such time as shall be prescribed by the court, and the court shall prescribe such time with a view to reasonable expedition of trial.
12. In the case of a motion for judgment upon any contract, other than a motion for recovery of damages for a breach thereof, if the plaintiff shall file with the notice a copy of

the contract, evidence of debt, or account on which the motion is to be made, stating distinctly the items of his claim, the aggregate amount thereof, the time from which he claims interest thereon, and the credits, if any, to which the defendant may be entitled, together with an affidavit made by himself, his agent or attorney, stating therein to the best of affiant's belief the amount of the plaintiff's claim, that such amount is justly due, and the time from which the plaintiff claims interest, a copy of which said contract, evidence of debt, or account and affidavit, certified by the clerk of the court, shall be served upon the defendant, and each defendant, if more than one, at the same time and in the same manner as the notice is served, judgment shall be rendered by the court for the plaintiff for the amount claimed in the affidavit, unless the defendant shall allege on oath of himself, or his agent or attorney, that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or state on such oath a sum certain less than that set forth in the affidavit led by the plaintiff which, as the affiant verily believes, is all that the plaintiff is entitled to recover from the defendant on such claim. If the defendant shall admit that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit filed by the plaintiff, judgment may be taken by the plaintiff for the sum admitted to be due, and the case be tried as to the residue.

13. In the case of a motion for the recovery of specific personal property the judgment for the plaintiff shall be that he recover such personal property, or so much thereof as he may be entitled to recover, or the value thereof as alleged in his notice in the event such personal property cannot be found or taken by the officer. If the plaintiff's notice be verified by the affidavit of himself, or his agent or attorney, to the truth of the facts therein stated to the best of affiant's knowledge and belief, and a copy of such affidavit, certified by the clerk, be served upon the defendant at the same time with the service of the notice, judgment shall be rendered by the court for the plaintiff for the specific personal property claimed in the notice, or the value thereof as alleged in the notice, as hereinbefore provided, unless the defendant shall allege on oath of himself, or his agent or attorney, that the plaintiff is not entitled, as the affiant verily believes, to recover from the defendant any of such personal property, or state on such oath what part or parts of such personal property the plaintiff is entitled to recover, denying the plaintiff's right to recover the residue of such personal

property. If the defendant shall admit that the plaintiff is entitled to recover from the defendant part of such personal property described in the notice, judgment may be taken by the plaintiff for such part thereof, or the alternative value thereof, as hereinbefore provided, and the case be tried as to the residue.

14. In the case of a motion for judgment for damages for the breach of a contract, express or implied, or for damages for a wrong, if the plaintiff's notice be verified by his affidavit to the truth of the facts therein stated, and a copy of such affidavit, certified by the clerk, be served upon the defendant at the same time with the service of the notice, judgment shall be rendered by the court for the plaintiff for such damages as he may establish by evidence, the amount of damages to be ascertained by the court or by a jury, as the plaintiff may elect, unless the defendant shall allege on his oath, or if defendant be a corporation, on the oath of its mayor, rector, president or vice-president, or other chief officer, that the plaintiff is not entitled to recover from the defendant any part of the damages alleged in the notice, or state on such oath what part of such damages the plaintiff is entitled to recover from the defendant, denying the plaintiff's right to recover the residue of such damages. If the defendant shall admit that the plaintiff is entitled to recover from the defendant any part of the damages claimed in the notice, judgment may be taken by the plaintiff for such amount of damages so admitted and the case be tried as to the residue.

15. Every circuit and corporation court may make such general orders, or adopt such general rules, consistent with the provisions of this section, as may be necessary or appropriate for regulating and facilitating the practice and procedure under this section.

16. This section shall be construed liberally.

An emergency existing, this act shall be in force from its passage.